

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

GEORGIA LEGAL SERVICES
PROGRAM, INC.

Employer-Petitioner

and

Case 10-UC-220

EMPLOYEES ASSOCIATION OF
GEORGIA LEGAL SERVICES, NATIONAL
ORGANIZATION OF LEGAL SERVICES
WORKERS (NOLSW), INTERNATIONAL
UNION, UNITED AUTOMOBILE
WORKERS (UAW), LOCAL 2320

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Georgia Legal Services Program, Inc., herein called Employer-Petitioner or Employer, is a non-profit law firm providing free civil legal services to indigent persons residing in

¹ Briefs filed by the Employer-Petitioner and the Union have been duly considered.

Georgia's rural communities outside of the five county metro-Atlanta area. During the past 12 months, the Employer-Petitioner has received gross revenues in excess of \$250,000. During this same period, the Employer-Petitioner has purchased and received goods and services at its Atlanta office valued in excess of \$50,000 from suppliers located outside the State of Georgia. Accordingly, the Employer-Petitioner is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Employer-Petitioner seeks to clarify the existing bargaining unit by excluding the classification of ombudsman coordinator. The Employer-Petitioner contends that the duties of this position have evolved over a period of time and that the 4 ombudsman coordinators possess and exercise many indicia of supervisory authority within the meaning of Section 2(11) of the Act and should appropriately be excluded from the unit. The Union claims that the duties of the position have not substantially changed since the Union was certified in 1986, that the 4 ombudsman coordinators are not Section 2(11) supervisors, and that they should therefore remain in the unit. The Union also argues that the petition should be dismissed because it was untimely filed after the parties initialed a new collective bargaining agreement. The Employer asserts that the petition was timely filed because it reserved its right to file during the course of the bargaining.

The Employer provides free legal services on civil cases to Georgians with low incomes in 154 counties, essentially all of Georgia except the metropolitan Atlanta area. The Employer maintains 12 offices state-wide which serve distinct geographic regions. The Union was certified in 1986 as the collective bargaining representative for a state-wide unit (all 12 offices) of employees. Since that time, the parties have signed a number of collective bargaining agreements covering employees in the following positions: "Staff Attorney; Law Assistant; Paralegal; Ombudsperson; Domestic Relations Coordinator; Intake Coordinator; Prison and Jails

Unit Compliance Coordinator; Community Advisor; Secretary; Secretary/Receptionist; Receptionist; and Advisor Secretary". (Emphasis supplied.) The ombudsman coordinator position is not mentioned at all in the unit description. Other specifically listed positions are excluded², as well as "supervisors and managerial employees and guards as defined by the Act." (Emphasis supplied.)

There are a total of 110 to 115 bargaining unit employees in the Employer's 12 offices state-wide. The approximate number of unit employees in each office ranges from 1 or 2 in Brunswick and Tifton to 21 in Savannah. There are approximately 9 to 15 employees in each of 7 offices, including Piedmont, Macon, Gainesville, Albany, Augusta, Columbus and Valdosta. The Waycross and Dalton offices each house approximately 6 unit employees. There are only 10 individuals employed as ombudspersons statewide (including the 4 disputed ombudsman coordinators), located at 3 offices, with 4 ombudspersons in Savannah, 3 in Piedmont, and 3 in Dalton. Up until this dispute, all of these 10 individuals, including the 4 ombudsman coordinators, have historically been covered by the collective bargaining agreements between the Employer-Petitioner and the Union.

With the foregoing as backdrop, I now consider the Union's claim that the petition was not timely filed. The term of the most recently expired collective bargaining agreement ran from January 1, 1999 through January 31, 2001. The parties began bargaining for a successor agreement some time in January, 2001. For at least the last 10 years, the salaries of

² The specifically listed excluded positions are: "Executive Director; Associate Director; Director of Litigation; Public Affairs Coordinator; Director of Migrant Farmworkers Project; and all other employees in the Atlanta Central Office; Georgia Clients' Council Secretary; State Bar Pro Bono Project Coordinator; State Bar Pro Bono Project Administrative Secretary; Managing Attorney; Satellite Supervising Attorney; Senior Staff Attorney; Supervising Attorney; Specialist Attorney; Senior Paralegal; Office Manager; Administrative Secretary/Office Manager; Administrative Secretary". It appears that the unit description is consistent with the Union's original certification in 1986 (even though some of the positions no longer exist). This unit description has been in every collective bargaining agreement between the parties since the first contract was negotiated in 1988.

ombudspersons and ombudsman coordinators were linked to the salaries of paralegal employees. At the beginning of the new bargaining round, the Union argued that ombudspersons and ombudsman coordinators generally had greater responsibilities than paralegal employees and should therefore be paid at a higher pay scale. Further, the Union argued that coordinators should be paid more than ombudspersons because of their greater responsibilities. The record shows that ombudsman coordinators participated in the bargaining on the Union side.

After the Union raised these issues at the table, according to the Employer's Executive Director, Phyllis Holmgren, the Employer "began to look at what the position [ombudsman coordinator] did and was suppose[d] to be and realized that it didn't look to us or smell to us like a bargaining unit position any more." A few weeks before the parties reached final agreement on all issues, the Employer proposed to remove the ombudsman coordinators from the bargaining unit, on the ground that they were supervisors. In response, the Union asserted that composition of the bargaining unit was a nonmandatory subject of bargaining and refused to bargain over the issue. At that point, according to the Union's chief negotiator, Tera Reese Beisbier, the Employer's lawyer stated that the Employer would have to file a unit clarification petition. The Union's chief negotiator replied, "go ahead."

The parties reached an overall written agreement on all issues by June 27, 2001. Before final agreement was reached, the ombudsman coordinator issue was one of two major issues left to resolve. On June 27, the Employer agreed to (and initialed) the Union's proposed job description and wage scale for the position, and stated it would petition the Board to decide whether the ombudsman coordinators should still be included in the unit. The Union's chief

negotiator testified that she replied, "fine, we'll look for it in the mail."³ The day after overall written agreement was reached on June 27, the Employer filed a unit clarification petition on June 28, 2001 in Case No. 10-UC-219.⁴

The Board has traditionally held that a unit clarification petition submitted during the term of a contract specifically dealing with a disputed classification will be dismissed if the party filing the petition did not reserve its right to file during the course of the bargaining.⁵ Wallace-Murray Corp., 192 NLRB 1090 (1971). As was stated by the Board more recently in Edison Sault Electric Company, 313 NLRB 753 (1994), "[T]he Board's rule is based on the rationale that to entertain a petition for unit clarification during the midterm of a contract which clearly defines the bargaining unit would disrupt the parties collective bargaining relationship." In effect, the Board has refused to permit a party, through a unit clarification petition, to effect a change in the composition of a bargaining unit during the contract term after that party has already agreed to the unit's definition. San Jose Mercury & San Jose News, 200 NLRB 105, 106 (1972); Monongahela Power Co., 198 NLRB 1183 (1972).

The Union cites Arthur C. Logan Memorial Hospital, 231 NLRB 778 (1977) in support of its contention that the instant unit clarification petition was untimely filed. In that case, the union essentially claimed it was sandbagged because the employer filed a unit clarification

³ The Union's chief negotiator testified that the Employer's lawyer stated the petition would be filed only after final agreement was initiated on outstanding issues on June 27. The Employer's lawyer testified she said a petition would be filed at the time she initialed the Union's proposals on the ombudsman coordinators. It appears from the record that the Employer's lawyer spoke of filing a petition within moments of reaching agreement, but it is not clear whether her remarks came before or after she initialed the documents.

⁴ This petition was withdrawn and refiled on July 30, 2001 as Case No. 10-UC-220 because the parties evidently were not available for a hearing on the petition until August.

⁵ See also St. Francis Hospital, Inc., 282 NLRB 950 (1987). In other limited circumstances the Board will entertain a unit clarification petition shortly after a contract is executed, provided that the petitioner raised the issue in the negotiations and did not abandon its request in exchange for some concession in negotiations. 282 NLRB at 951.

petition regarding positions it had already agreed to cover under an extended collective bargaining agreement. Unlike the instant case, there was no evidence in Logan that the employer had ever raised the matter of filing a unit clarification petition regarding the disputed positions during the course of bargaining. See also Edison Sault, cited supra, a case in which the employer had never even questioned the unit placement of the disputed classification during the course of bargaining. 313 NLRB at 753-4. Here, in contrast, the Union admits that the Employer-Petitioner on at least two occasions expressed its intention to file a unit clarification petition. There is no evidence that the Employer ever expressly withdrew from this position or renounced its reservation in exchange for any concession from the Union. St Francis Hospital, supra. To the contrary, the Employer evidently conceded to the Union's proposals on job description and wage scale for the coordinators. The possibility that the Employer may have renewed its reservation moments after, as opposed to moments before, initialing the Union's proposals is not sufficient to establish that the Employer had abandoned its right to go to the Board. The Baltimore Sun Co., 296 NLRB 1023, 1024 (1989). The Employer herein, unlike the employers in Logan and Edison Sault, reserved its right to file during the course of bargaining. In any case, the unit description in the instant case does not expressly include or exclude the disputed position. In these circumstances, it would not disrupt the bargaining relationship to entertain the petition. Accordingly, I find that the petition herein was timely filed.

As is noted above, the Employer seeks to clarify the unit to exclude the ombudsman coordinators because the position "over the years" has "evolved into a supervisory position, which should not be included in the unit." The Union, on the other hand, asserts that the coordinators do not possess or exercise any supervisory authority and hence should remain in the unit. The Union's alternative legal theory is that even if they are statutory supervisors, the

petition should nonetheless be dismissed because the ombudsman coordinator position has historically been included in the bargaining unit and there has been no showing that the position has undergone recent substantial changes.

I do not agree with the Union's alternative legal theory. The Act provides specifically at Section 2(3) for the exclusion of "supervisors." While the position sought to be excluded may have long been included under previous contracts and the job duties of the position have remained unchanged, nonetheless, if it can be shown that the position meets the test for establishing supervisory status, I am compelled to exclude it. The Washington Post Co., 254 NLRB 168, 169 (1981); Bethlehem Steel Corporation, 329 NLRB No. 32 (1999), at fn. 5. Moreover, the unit description herein specifically excludes "supervisors." Thus, notwithstanding the historical inclusion of ombudsman coordinators in the unit, dismissal of the petition is not warranted because of the statutory issue involved.

It is well settled that the burden of proving supervisory status rests on the party advancing the argument. See NLRB v. Kentucky River Community Care, 121 S.Ct 1861, 1866-1867 (2001); Ken-Crest Services, 335 NLRB No. 63 (2001). Accordingly, the Employer-Petitioner herein must demonstrate that the ombudsman coordinators possess or exercise Section 2(11) authority. The Employer, in addition to providing civil legal services to the indigent, is also a "provider" agency designated by the Ombudsmen Program of the State of Georgia, a state agency, to provide ombudsman services in long term care facilities, nursing homes or personal care homes within designated geographical areas. The Employer provides these services pursuant to individual contracts with local area aging agencies involving 3 of its 12 offices: Piedmont, Dalton, and Savannah. Pursuant to these contracts, the ombudsmen and ombudsman

coordinators essentially have statutory authority to enter facilities to investigate problems; to assess the level and adequacy of care; to bring complaints to the attention of facility management or state authorities; and to mediate and resolve such problems (usually involving family members). From time to time, the ombudsmen and ombudsman coordinators also make referrals to the Employer's staff attorneys. State law requires that information in ombudsman files be kept confidential with respect to the public at large.⁶

As is noted above, the record shows that there are 4 ombudsman coordinators located in the 3 Employer offices which provide ombudsmen services: Renee Sanders and Mary W. Pope (both at Piedmont); Cindy Wade (Dalton); and Pamela Lipsitz (Savannah). All but 1 of the 4 coordinators has been employed by the Employer for at least 15 years; only Lipsitz has worked a shorter period of time (since 1993). In addition, there are 6 other "ombudspersons" in the unit, including 1 at Piedmont; 2 at Dalton; and 3 at Savannah. Three of these 6 work only part-time. All 6 were hired in 1998 or more recently and thus have less seniority than the coordinators. Melinda Agee, the Employer's managing attorney at Piedmont and Dalton, testified that 3 of the 4 coordinators work under her charge. According to Agee, each of the 3 coordinators works under the supervision of Supervising Attorneys.⁷ The supervising attorneys are not permitted to review individual files; however, they do oversee the number of homes each ombudsman (or coordinator) visits, as well as the reports that ombudsmen (and coordinators) are required to file with the state.

⁶ The Employer's non-ombudsman personnel are not permitted to review the individual case files. However, there is some evidence that ombudsmen discuss cases with staff attorneys from time to time, without using patient names.

⁷ Pope's immediate supervisor is Supervising Attorney Mary Dickerson. The immediate supervisor for coordinators Sanders and Wade is Supervising Attorney Alisa Haber. Haber also delivers elderly legal services pursuant to the contract with the aging agency involved.

The Employer's ombudsman program evidently began some time in the 1980's. At some point, with the infusion of more money into the program (through passage and implementation of the Older Americans Act), the state created the position of ombudsman coordinator.⁸ Before the last bargaining round, according to the Employer's Executive Director, Phyllis Holmgren, the position was viewed simply as an "administrative link" between the State Ombudsman's Office and the Employer's program. In 1997, the state published a manual of policies and procedures applicable to ombudsman's programs. In part, the manual prescribes the qualifications needed to be designated by the State Ombudsman as an ombudsman coordinator or ombudsman, as well as the duties and responsibilities of coordinators and ombudsmen.

The state manual prescribes somewhat different educational and experience requirements for ombudsman coordinators and ombudspersons. Ombudsman coordinators are required by the state to have an undergraduate degree from a 4-year college, while ombudspersons are required to have completed 2 years of undergraduate education. In order to be appointed coordinators by the state, an individual must have 3 years of experience in aging or a related field, while ombudspersons are required to have only 2 years of such professional experience. Both coordinators and ombudspersons must attend the same training conducted by the State Ombudsman's Office and must be certified by the state following completion of training.⁹

All ombudsmen and coordinators carry individual caseloads and are therefore responsible, pursuant to the state manual, for: providing services to protect the health, safety, welfare and rights of residents; fulfilling program objectives; documenting activities and

⁸ The record does not indicate the year in which the state created the position.

⁹ It is not clear whether these requirements were in effect prior to publication of the manual in 1997.

casework as required by the state; adhering to the Ombudsman Code of Ethics; and prohibiting inappropriate access to individual records and case files. Pursuant to the state manual, the coordinators, in addition to the general responsibilities outlined above, are also responsible for¹⁰ "overall management and development" of the program involved; "supervision of all other" ombudsman "staff and/or volunteers"; "assuring that non-certified staff and volunteers work under the direct supervision" of a certified ombudsman; submitting an Annual Plan indicating program goals and objectives; assuring that the Plan is satisfactorily accomplished; arranging for adequate ombudsman coverage; and regularly reporting on ombudsman activities by submitting accurate data and reviewing summary reports submitted to the state.

Notwithstanding the above-described provisions in the state manual, the coordinators have been historically responsible only for supervision of non-unit personnel, i.e., unpaid volunteers, volunteer visitors, and interns. At the hearing, Melinda Agee, the Employer's managing attorney at Piedmont and Dalton, testified that "by virtue of their position in the bargaining unit heretofore" the ombudsman coordinators "have not had supervisory roles by definition over other staff people." Contrary to Agee's testimony, the Employer claims that the coordinators have authority to effectively recommend the hire of additional ombudsman staff. Two of the 4 coordinators testified at the hearing regarding their input with respect to hiring.

Renee Sanders, 1 of the 2 coordinators at Piedmont, testified that she reviews employment applications and attends applicant interviews. She evidently recommended the hire of the 2 ombudsmen at Dalton (Jeff Taylor and Ramona Hambrick) to her supervising attorney,

¹⁰ According to the Union, the coordinator job description agreed upon by the Union and the Employer echoes the list of tasks set out in the state manual. The job description states, in pertinent part, "The Coordinator shall be responsible for all of the same responsibilities as the Ombudsman, and in addition, shall have supervisory and compliance responsibility for the following tasks."

but the supervising attorney was also present at the interviews. Mary Pope, the other coordinator at Piedmont, indicated she recommended the hire of the 1 part-time ombudsperson at Piedmont to her supervisor. However, the record shows that prior to hire, the individual had a track record as a volunteer. Moreover, Pope's recommendation to extend this employee's probationary period was not followed by the Employer.

The record shows the coordinators schedule and oversee the work (including the filing of state reports) of unpaid volunteers. They also accompany ombudsmen who are not yet certified on visits to facilities.¹¹ There is no evidence that the coordinators have any authority to discipline unit personnel; Coordinator Sanders testified she believed one of the other coordinators once recommended the discharge of an unpaid volunteer. The coordinators also coordinate the schedules of ombudsmen and volunteers to ensure that all facilities have coverage. The ombudsmen are assigned geographic areas and service facilities in their assigned areas. In the event an ombudsman is unavailable to work on a particular day, the coordinator uses friendly persuasion to secure a substitute. Although the Employer claimed that the coordinators currently conduct performance evaluations of ombudsmen's work, there is no evidence to support this assertion.¹²

There was much testimony at the hearing regarding the input of the ombudsman coordinators in the formulation of the "Annual Plans" for the program. Each annual plan must contain information on 12 state-prescribed "components", including items such as complaint processing, information and assistance, plans for community education and in-service education

¹¹ Uncertified ombudsmen are not permitted by the state to visit homes on their own. State regulations require that they be accompanied by a certified ombudsman, not a certified ombudsman coordinator.

¹² One of the coordinators testified that she evaluated a particular employee more than 10 years ago before the Union was certified.

to facilities, routine visits, issues advocacy and interagency coordination. A copy of one of these plans was offered in evidence at the hearing; it contains routine information, such as number of personnel employed and assigned to particular tasks, a generalized description of intake procedures, applicable statutory standards in responding to complaints, and the number and type of community and in-service education sessions planned for the year.¹³ The evidence shows that the formulation of such plans is generally a group project in which all affected ombudsmen, ombudsman coordinators, and supervising attorneys participate. The group reviews the prior year's plan and discusses whether to incorporate any changes. The plan is ultimately submitted to the state by the Office Manager.

Based on the foregoing, I find that the Employer-Petitioner has not met its burden of proving that the ombudsman coordinators exercise or possess any supervisory authority within the meaning of Section 2(11). I am not persuaded that the coordinators utilize independent judgment in effectively recommend the hiring, firing or discipline of employees. It appears that their views have been solicited on hiring, but decisions are made after supervision engages in independent consideration of the applicant. There is no evidence that the coordinators have effectively recommended the termination of any unit employee. The only instance in which a coordinator recommended "discipline" (i.e., extension of probationary period), the coordinator's recommendation was not followed. Neighborhood Legal Services, Inc., 236 NLRB 1269, 1272 (1978); compare Fred Meyer Alaska Inc., 334 NLRB No. 94 (2001).

I am also not persuaded that the role played by coordinators in the formulation of annual plans is sufficient to confer supervisory status. As is noted above, the state, by

¹³ The ombudsman coordinators perform administrative tasks in connection with these training sessions, such as arranging transportation, dates, location, hotels, etc. All ombudsman personnel are involved in encouraging in-

prescribing components, limits discretion in the formulation of the plans. Ohio State Legal Services Ass'n, 239 NLRB 594, 597 (1978). Moreover, the plans appear to be routine reports on general objectives for the coming year. Neighborhood Legal Services, *supra*, 236 NLRB at 1272-3. In any event, the record establishes that formulation of the plans is more of a group project, involving affected unit employees and supervising attorneys.

I am also not persuaded, as the Employer asserts, that the record establishes the coordinators utilize independent judgment in the assignment of work, either to unit employees or unpaid volunteers¹⁴. As is noted above, the ombudsmen are assigned geographic areas and service facilities in those areas. Any coordination in scheduling employees and unpaid volunteers is limited to reasoned persuasion. Given the above, the coordinators' role in this area is routine. Any direction to uncertified ombudsmen or unpaid volunteers appears to be more a function of their experience and expertise, rather than the exercise of authority in the interests of the Employer. Ohio State Legal Services, *supra*, 239 NLRB at 597, 599; Northwest Florida Legal Services, Inc., 320 NLRB 92, 93-4 (1995).

Finally, the authority granted by the state manual and job description to the ombudsman coordinators is not sufficient to confer supervisory status. Although these documents state that they are responsible for the direction and supervision of unit personnel, such "paper authority" which is not exercised does not establish supervisory status. Crittenton Hospital, 328 NLRB 879 (1999). And, as I have found above, there is no evidence that such authority has been exercised. In view of the above, I find that the Employer has not carried its burden of proving that the ombudsman coordinators possess or exercise supervisory authority

house facility personnel or community professionals to attend such sessions.

within the meaning of Section 2(11), and I therefore deny the Employer's request to clarify the unit to exclude them. Accordingly, I shall dismiss the Employer's unit clarification petition.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by October 8, 2001.

Dated at Atlanta, Georgia, on this 24th day of September, 2001.

/s/ Martin M. Arlook
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¹⁴ The Board has held unpaid volunteers not to be statutory employees. WBA1 Pacifica Foundation, 328 NLRB 1273 (1999).

